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No. 86-1547

In The

Supreme Court of the United States

October Term, 1986

ANNE B. PARKS,

Petitioner,

v.

MICHIGAN EMPLOYMENT SECURITY COMMISSION and DETROIT PUBLIC SCHOOLS,

Respondents.

BRIEF OF DETROIT PUBLIC SCHOOLS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHERE PETITIONER'S DISCHARGE WAS ADJUDICATED IN A PREVIOUS CASE BETWEEN THE PARTIES TO BE PROPER, AND WHERE PETITIONER CONCEDED BELOW SUCH PROPRIETY, IS SHE PRECLUDED BY *RES JUDICATA* FROM ASSERTING HER PRESENT CLAIM?

II.

MAY AN EMPLOYEE WHO IS PROPERLY DISCHARGED FOR HER CONSTITUTIONALLY UNPROTECTED FAILURE TO PAY AGENCY SERVICE FEES NEVERTHELESS CLAIM A CONSTITUTIONAL ENTITLEMENT FROM HER EMPLOYER TO UNEMPLOYMENT COMPENSATION FOR THE SAME FAILURE?

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COUNTER-STATEMENT OF THE CASE

Petitioner Parks was a plaintiff in *Abood* v *Detroit Board of Education*, 431 US 209 (1977), wherein she, along with certain other Detroit school teachers, challenged the right of their employer, the Detroit Board of Education, to enter into an agency shop agreement requiring them to pay agency service fees to the union which represented them. In *Abood*, this Court held that it was constitutionally permissible for the school board to require employees to pay their share of the union's costs of collective bargaining, contract administration and grievance adjustment. 431 US 225-226. The Court remanded the case, stating that it would be appropriate under Michigan law to defer further proceedings until the parties

utilized the union's internal procedure for determination of what portion of the union's dues the plaintiffs could be compelled to pay. 431 US 242. The Court noted that the constitutional sufficiency of the internal procedure would be subject to further judicial scrutiny. 431 US 242 n. 45.

Upon remand, the *Abood* plaintiffs (including Parks) moved to escrow their fees pending the resolution of the internal union procedure. The motion was denied and no appeal was taken. *Detroit Board of Education* v *Parks*, 417 Mich 268, 272 n. 1. While other *Abood* plaintiffs paid the fees or invoked the internal review procedure, Parks did neither. She declined to pay any fees to the collective bargaining agent.[1] She was then dismissed from the *Abood* suit for lack of standing (and did not appeal that dismissal). In March, 1978, she was discharged from her employment. *Id* at 272 n. 1.

Parks challenged the legality of her discharge, contending only that it was contrary to the Michigan Teachers Tenure Act. In *Detroit Board of Education* v *Parks*, 417 Mich 268 (1983), the Michigan Supreme Court held that her discharge was lawful.

Parks also challenged the decision of the Michigan Employment Security Commission (MESC) to deny her unemployment compensation benefits, and it is that litigation which Parks seeks to bring before this Court by her petition for certiorari. The MESC held that Parks

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[1] The repeated assertions in the Petition as to why such payment was not made are entirely after-the-fact, self-serving statements rather than contemporaneous expressions. Furthermore, the petitioner's assertion (p. 8) that, "On remand, the trial court ordered her to pay a fee equal to dues to the union and then exhaust the union's rebate procedure," is not only unsupported by the record but is untrue. Petitioner was not ordered by the circuit court to do anything. She was dismissed by the Court as a party plaintiff, on motion, when she did not pay the fees and she was discharged by the respondent as an employee for such non-payment.

was disqualified from receiving unemployment compensation benefits because her discharge was tantamount to a voluntary leaving of employment. (App. pp. 67a, 71a-75a)

In *Parks II*, the present case, the Michigan Supreme Court made the following finding:

> [D]uring oral argument in the instant case, plaintiff's counsel explicitly noted that Dr. Parks was not trying to relitigate *Abood* or challenge her discharge. He further admitted that the agency fee is constitutional and that plaintiff's argument was not meant to suggest that the discharge was unlawful. Parks' argument, instead, was directed solely at the [statutory] issue addressed in this opinion.
>
> Since plaintiff did not before this Court pursue the constitutional status of her discharge after her dismissal from *Abood* and is not contesting it now, we, for purposes of the disposition of this case, assume no constitutional infirmity in her discharge. (App. pp. 6a-7a n. 1)

The majority of the Michigan Supreme Court thereupon addressed itself to the statutory issues presented by the case and concluded on state grounds that Parks was correctly disqualified from receipt of benefits.

Parks now seeks certiorari, claiming that the Michigan Supreme Court, which twice considered the circumstances of her discharge, was in error, and claiming that even though it was not unconstitutional to discharge her it was nevertheless unconstitutional to deprive her of unemployment compensation benefits for the selfsame conduct.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S CONSTITUTIONAL CLAIM IS PRECLUDED BY A PRIOR JUDGMENT AND BY ADMISSIONS BELOW.

Petitioner's claim that she was unconstitutionally denied unemployment compensation benefits because of the exercise of her First Amendment rights is not only without merit (see part II below), but is precluded by a prior judgment and by her admissions below.

In *Detroit Board of Education* v *Parks*, 417 Mich 268 (1983) (hereinafter *Parks I*), it was held that plaintiff was justifiably discharged for her non-payment of agency shop fees. That was the very issue in that case. Subsequent to the remand from this Court in *Abood* v *Detroit Board of Education*, 431 US 209 (1977), the Wayne Circuit Court, in *Abood*, denied plaintiffs' motion for an escrowed fee arrangement (some six years prior to this Court's decision in *Chicago Teachers Union* v *Hudson*, 475 US __, 106 S Ct 1066, 89 L Ed2d 232 (1986)). As subsequently summarized by the Michigan Court of Appeals in *Parks I*, 98 Mich App 22, 46 n. 24 (1980), adopted as footnote 1 by the Supreme Court in its opinion in *Parks I* at 417 Mich 268, 270 (1983), "no appeal [from the denial of that motion] was taken. In February of 1978, the circuit court granted defendants' motion to dismiss Anne Parks and Genevieve Repeta as plaintiffs for failure to pay agency shop fees. In March, 1978, Parks was discharged from her employment by the Board for failure to pay the fees, and she appealed her discharge to the State Tenure Commission."

Contrary to the claim in her present Petition, Parks did not "offer" to pay the disputed fees, much less did she tender them. The affidavit relied upon by Parks in

her present Petition in support of the statement that "she offered to pay into escrow the entire fee demanded; but she was not willing to pay any money directly to the union until it proved her proportionate share of its costs of collective bargaining, contract administration and grievance adjustment" (Petition, p. 5), is in fact an affidavit, dated September 6, 1977, among many similarly then filed in support of the *Abood* plaintiffs' collective motion for payment of their agency fees into escrow. It was *not* an "offer" made by Parks independently or subsequently to forestall her discharge. (App. pp. 77a-81a) Furthermore, she never tendered the agency fee, either conditionally or unconditionally; and her present explanation as to why she refused payment is simply a post-hoc rationalization framed in the words of a case decided six years later, *Chicago Teachers Union* v *Hudson, supra*, rather than a contemporaneous expression.

Not only did petitioner not offer or tender the agency fees, nor give any contemporaneous explanation as to why she was not paying the fees, nor appeal the denial of escrow, nor appeal her dismissal as a party plaintiff, nor appeal on any constitutional ground her discharge by the school board, she pursued only a state Tenure Act remedy, which was decided adversely to her in *Parks I*. The decision in *Parks I* is *res judicata* against any attempt subsequently — as here — to raise either constitutional or other issues as to the validity of her discharge.

Moreover, in the present case the Michigan Supreme Court made the findings which appear in footnote 1 (App. pp. 6a-7a), that petitioner's counsel conceded "that Dr. Parks was not trying to relitigate *Abood* or challenge her discharge. He further admitted that the agency fee is constitutional and that plaintiff's argument was not meant to suggest that the discharge was unlawful . . . . [¶] Since Plaintiff did not before this Court pursue the

constitutional status of her discharge after her dismissal from *Abood* and is not contesting it now, we, for purposes of the disposition of this case, assume no constitutional infirmity in her discharge."[2]

In short, in making an argument here that she was denied unemployment compensation for the exercise of her First Amendment rights, petitioner is in effect improperly seeking to relitigate the preclusive adjudication in *Parks I* and her contrary admissions in this case. Such an argument represents an improper collateral attack on matters previously decided or foreclosed and may not be appropriately presented to this Court.

II.

EVEN COULD THE MATTER BE CONSIDERED, PETITIONER'S CLAIM IS WITHOUT MERIT.

Even if the matter were properly before this Court, petitioner cannot present a meritorious claim for the alleged violation of her First Amendment rights.

As noted above, the Michigan courts found that after the denial of the *Abood* plaintiffs' escrow motion, which order was unappealed, petitioner Parks simply declined to pay her fees and for that reason was successively dismissed as a party plaintiff in *Abood* and as an employee by respondent Board.

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[2] Parks, in her brief to this Court, again conceded the lawfulness of her discharge, stating at page 11, "In *Abood, supra*, the Court found that the state had an important interest in requiring an employee to reimburse his union for its costs of collective bargaining on his behalf. 431 US at 221-226. Thus, the state could allow a public employer to make the payment of such a fee a condition of employment. In this case the collective bargaining agreement made the payment of a service fee a condition of employment. *Discharge was Dr. Parks' penalty for refusing to pay the agency fee.*" (Emphasis added)

Although the Michigan Supreme Court found and held in *Parks I* that her discharge was proper, and although she concededly has not heretofore contested its constitutionality, petitioner would now assert that she is unconstitutionally being punished for the exercise of her First Amendment rights. Although she denies it, petitioner really argues that although her employer had justification to discharge her for her *unprotected* exercise of First Amendment rights, it nevertheless became obligated to pay her unemployment compensation for that unprotected exercise.[3]

But it is a contradiction for petitioner to concede on the one hand, as she must, that she was properly discharged for her "exercise of First Amendment rights" and yet contend that she must receive unemployment compensation because of her exercise of the selfsame rights.

The claim of petitioner that *Abood* recognized her First Amendment rights is disingenuous. This Court said in *Abood* that, "To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. . . . But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of th important contribution of the union shop to the system of labor relations established by Congress." 431 US 222. In short, this Court held that fee dissenters' First Amendment rights are not absolute but are subject to countervailing interests, and a failure to make the required payment exposes the free rider to discharge. 431 US 209, 212, 236.

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[3] Under Michigan law, the school board, like other public employers, in fact completely reimburses the unemployment compensation fund for all benefits paid to its employees by the State. MCL 421.13i(1)(a).

In the present case, petitioner concedes that, "In *Abood, supra,* the Court found that the state had an important interest in requiring an employee to reimburse his union for its costs of collective bargaining on his behalf. 431 U.S. at 221-26. Thus, the state could allow a public employer to make the payment of such a fee a condition of employment. In this case the collective bargaining agreement made the payment of a service fee a condition of employment. *Discharge was Dr. Parks' penalty for refusing to pay the agency fee."* (Emphasis added) Petitioner's brief, p. 11.

Parks' argument, that while discharge for non-payment is permitted unemployment compensation is nevertheless required, ignores the obvious burden that requiring the payment of unemployment compensation would impose upon an employer and the consequent reluctance which an employer would have to enter into or enforce a union security agreement, which agreement *Abood* recognizes serves an important state interest.

It is irrational to say on the one hand that petitioner's First Amendment rights do not protect her against discharge by her employer but to say on the other hand that her employer is required to pay her compensation for not working. It is as if public employees who are subject to discharge for engaging in constitutionally *un*protected speech, cf. *Connick* v *Myers,* 461 US 138 (1983), can nevertheless claim a constitutional right to unemployment compensation from the same employer for the same speech.

Petitioner's reliance upon *Hobbie* v *Unemployment Appeals Commission of Florida,* 480 US __, 108 S Ct __, 94 L Ed2d 190 (1987); *Sherbert* v *Verner,* 374 US 398 (1963); and *Thomas* v *Review Board of Indiana,* 450 US 707 (1981), is totally misplaced. In each of these cases the employee's unemployment resulted from the exercise of

First Amendment rights. The issue in each was whether, given that fact, the employee was constitutionally entitled to unemployment compensation. By contrast, Parks' unemployment resulted arguably at most from the exercise of speech held to be *un*protected by the First Amendment and, in fact, resulted from the mere non-payment of mandatory service fees. *Parks I, supra.* Therefore, there is no constitutional issue raised regarding her entitlement to unemployment compensation and those cases have no relevance whatsoever.

If the Detroit Board of Education had to discharge the petitioner, as it did, and as she concedes it did, because of her refusal to pay any part of her agency service fee, then surely it cannot be said that the Detroit Board has an obligation to bear the cost of her unemployment compensation payments. To sustain petitioner's argument would be to hold that unprotected speech which justifies a governmental employee's discharge nevertheless entitles her to compensation from the same employer for subsequently not working. To state the proposition is to answer it.

There is no meritorious constitutional issue presented.

CONCLUSION

WHEREFORE, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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